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April 20, 2012

Committee on Ways and Means  
Subcommittee on Oversight  
ATTN: The Honorable Charles Boustany (R-LA), Subcommittee Chairman  
1102 Longworth House Office Building, Room 1100  
Washington D.C. 20515

Re: Comments for April 25, 2012, Hearing on the Impact of Limitations on the Use of  
Tax-Advantaged Accounts for the Purchase of Over-the-Counter (OTC) Medication

To Whom It May Concern:

Thank you for the opportunity to provide comments to the Subcommittee.

Based in Coldwater, Michigan, Infinisource, Inc. is a payroll and benefit administrator that provides administrative services related to payroll, tax-advantaged accounts (including Health FSAs, Health Reimbursement Arrangements [HRAs] and Health Savings Accounts [HSAs]), COBRA and HIPAA. Our client base numbers more than 18,000 employers nationwide. All told, we have more than 800 Health FSA clients, over 250 HRA clients and some 30 HSA clients.

As you are well aware, Section 9003 of the Affordable Care Act (ACA) has had a significantly negative effect on tax-advantaged accounts since January 1, 2011. In assisting employers, patients and consumers with these benefits every day, we have seen first-hand the burdens and inefficiencies of this provision.

We see at least six reasons why Congress should consider repealing Section 9003:

- The OTC restriction forces people to pay for OTC medication with after-tax dollars.
- The OTC restriction provides an exception to the rule that adds cost to the health care system.
- Participants around the country have already commented on the hardships that result from Section 9003.
- The OTC restriction essentially amounts to a tax on the working class of America.
- Tax-advantaged accounts serve a vital purpose for a significant segment of society, and limiting their application frustrates that purpose.
- Physicians are already overburdened by the amount of time they spend on non-reimbursable activities, and Section 9003 simply adds to that burden.

**1. The OTC restriction forces people to pay for OTC medication with after-tax dollars.**

In late 2003, the IRS issued Revenue Ruling 2003-102, which permitted tax-advantaged accounts like Health FSAs to reimburse OTC items. For years, this ruling empowered

consumers to use pre-tax dollars to purchase OTC medication. This is significant because an increasing number of drugs are now available over-the-counter and because prescription drugs (even generics) are an expensive health plan cost. Section 9003 simply eliminates this right, requiring consumers to obtain a prescription for non-prescription medication. Most consumers will not do this because it requires involvement with a doctor, which will likely entail an office visit. As a result, many consumers simply purchase the medication with after-tax dollars.

Good public policy should encourage and facilitate the use of OTC medication whenever possible. The Consumer Healthcare Products Association recently issued a study, *"The Value of OTC Medicine to the United States."* A major finding was that the U.S. health care system saves \$6 to \$7 every time an OTC drug is purchased, providing over \$100 billion in value each year. Section 9003 significantly restrains the ability of OTC drugs to provide maximum benefit to the U.S. health care system.

*"When you consider that every dollar spent on an OTC medicine saves our system 6 to 7 dollars in avoided cost, it is paramount that our policymakers do all they can to encourage consumer access to OTC medicines for self-treatable conditions,"* CHPA President and CEO Scott M. Melville said.

## **2. The OTC restriction provides an exception to the rule that adds cost to the health care system.**

One exception to the OTC restriction is that prescribed OTC medications are reimbursable under a Health FSA, HRA or HSA on a pre-tax basis. However, this entails involvement from the physician. This adds time and cost for the consumer. Typically, instead of self-medicating a health condition (e.g., cold, flu, allergies), the consumer now must pay an office visit co-payment, and the health plan must pay for the balance of that office visit, which in some geographic areas can exceed several hundred dollars. The consumer has to wait for an appointment and take time away from work. Before Section 9003, the consumer had the freedom to obtain the OTC medication at any time of day or night, use an electronic payment card at the point of sale, and have the expense auto-adjudicated immediately.

Another option is for the consumer to try to obtain a prescription over the phone without an appointment. This is very difficult and time-consuming to do because physicians are very busy. Many physicians will refuse to accommodate these requests for reasons explained below.

In addition, if a consumer does obtain a prescription from the physician and makes an OTC purchase, that transaction is not auto-adjudicated. The consumer must provide written documentation to the claims administrator to receive reimbursement, which typically occurs several weeks later.

## **3. Participants around the country have already commented on the hardships that result from Section 9003.**

A website, called [www.savemyflexplan.org](http://www.savemyflexplan.org), has documented several testimonials about the hardships of Section 9003. The following are samples:

- **Audrey - Kentucky:** The new requirement means I can no longer use flex spending money for OTC medications without a doctor's visit. Going to the doctor for these things costs me money--both in the co-pay as well as time away from work. This reduces productivity in the workforce and wastes my doctor's time slotting an appointment to write me a prescription for Tylenol instead of attending to patients who have more serious medical needs. Moreover, it is an unnecessary doctor's visit, which will artificially inflate health care expenses. Please work to repeal this rule and allow OTC medications back in flex spending as they used to be--without a prescription! After all, isn't that the definition of OTC?!
- **Laura - Utah:** It is horrible to not be able to purchase OTC medications on my flex card, specifically because I have a child who has Febrile Seizures [sp] if she gets a high fever. This is something that is very easily treatable with Tylenol or IB. Before when I knew she was getting sick, I would run to the store, and be able to buy the medicine. Now, not only do I have to obtain a prescription for it, I also have to pay for it out of pocket and wait for a reimbursement. In these times, I just don't have the extra money to put away, and wait for someone to pay me back later, since it is already taken out of my paycheck. When these charges come up, I shouldn't need a prescription, and I should be able to use my flex card like I did in the past.
- **Lisa - Nebraska:** My spouse uses OTC allergy medicine which is just as effective for him as an allergy medication obtained with a prescription. Prior to 2011, we were able to use our FSA debit card to obtain this OTC medication. With the new regulation, we had to pay for a doctor visit just to be able to submit this for reimbursement. In doing so, we are still not able to use our FSA debit card, but must pay cash, submit a paper claim form along with the prescription, and wait for a check to be issued to us. Not only is this inconvenient for us, it is costing us more money to visit the doctor, is wasting the doctor's time, is costing our health plan more for an 'unnecessary' visit to the doctor, and is costing the FSA plan administrator more to process the paper claim. We would appreciate being able to go back to getting OTC meds as we have in the past saving all of us much needed time and money.

#### **4. The OTC restriction essentially amounts to a tax on the working class of America.**

Surveys have shown that the average Health FSA participant earns about \$55,000 per year and that Health FSAs benefit about 35 million Americans. HRA and HSA participants number in the several millions as well. Most of these health care consumers are working class Americans, struggling to make ends meet, especially with escalating health care costs. The pre-tax advantage of tax-advantaged accounts is very important. The fact that OTC medication is now presumptively post-tax amounts to a tax on many who cannot afford it.

Paying for benefits on a post-tax basis means that you use after-tax dollars, which employees receive after federal and state income tax and FICA withholding. This essentially eliminates at least a 25 percent discount on OTC medications that was previously available to consumers.

**5. Tax-advantaged accounts serve a vital purpose for a significant segment of society, and limiting their application frustrates that purpose.**

Tax-advantaged accounts play an important in controlling health care costs. They empower consumers to pay for out-of-pocket expenses (e.g., co-payments, co-insurance, prescriptions and deductible expenses) with pre-tax dollars. Families also use tax-advantaged accounts to defray the cost of dental treatments and vision expenses. Tax-advantaged accounts pay for chronic conditions (e.g., high blood pressure and asthma). When these benefits undergo a serious restriction, this causes health care costs to rise.

Tax-advantaged accounts are not misused. Current law requires that every Health FSA and HRA expense must be verified by an independent third party as medically necessary before it is reimbursed on a pre-tax basis. Most consumers run out of money before the end of the year. Those who don't often purchase needed OTC medications toward the end of the year. This option is no longer available because of Section 9003.

**6. Physicians are already overburdened by the amount of time they spend on non-reimbursable activities, and Section 9003 simply adds to that burden.**

When Section 9003 took effect, it caught many physicians and pharmacies by surprise. One news report told the story of a Roseville family practice physician who said that her office received calls from three or four patients per week, sometimes wanting 5-10 prescriptions at a time for OTC medications.

Another health care professional has pointed out that physicians already spend a good amount of time on activities that are not reimbursed by patients or insurance. Examples from one physician who tracked such activity on a daily basis were as follows:

- Over 20 phone calls
- Over 16 e-mails
- Over 19 lab reports reviewed
- Over 12 prescription refills

None of these were reimbursable. To compound the problem, a physician undertakes liability every time he or she writes a prescription, even if it is for OTC medication. Physicians are reluctant to do this without examining the patient in an office visit. After all, OTC medications can have side effects as well.

We want to thank the Subcommittee for this opportunity to comment on the impact of limitations on the use of tax-advantaged accounts for the purchase of OTC medication. If you have any questions or concerns, please feel free to contact me or Connie Gilchrest, our Research and Compliance Specialist, who assisted with these comments, at 800-300-3838 or via e-mail at [rglass@infinisource.com](mailto:rglass@infinisource.com) or [cgilchrest@infinisource.com](mailto:cgilchrest@infinisource.com).

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Thank you for your consideration.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "RGlass". The signature is stylized with a large, looped "R" and a cursive "Glass".

Rich Glass, JD  
Chief Compliance Officer  
Infinisource, Inc.

Via e-mail (sent to [waysandmeans.submissions@mail.house.gov](mailto:waysandmeans.submissions@mail.house.gov))

cc: The Honorable Dave Camp (R-MI), Chairman of the Committee on Ways and Means